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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

RICHARD WILSON and ALWIN SMITH
Petitioners,

v.

JOHN HARVEY MILLER and
DEBBIE TUCKER LOVELESS
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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41 pp

QUESTIONS PRESENTED

1. When a public official files a properly supported motion for summary judgment raising the defense of immunity from suit, and subsequently files evidentiary objections to the summary judgment evidence offered to defeat the immunity, must a proper immunity analysis necessarily include an express evaluation of the competency of the evidence offered to defeat the immunity?

2. Whether a claim in the nature of a malicious prosecution is cognizable under 42 U.S.C. §1983.

LIST OF PARTIES

1. Plaintiff-Respondent John Harvey Miller, a resident of Reno County, Kansas
2. Plaintiff-Respondent Debbie Tucker Loveless, a resident of Walker County, Texas
3. Defendant Rains County, Texas
4. Defendant Frank Long, District Attorney for 8th Judicial District of Texas
5. Defendant-Petitioner Alwin Smith, former Assistant District Attorney, 8th Judicial District of Texas.
6. Defendant-Petitioner Richard Wilson, Sheriff of Rains County, Texas
7. Defendant Charles M. Cobb, of Mt. Pleasant, Texas
8. Defendant V.V. Gonzales, M.D., of Tyler, Texas
9. Defendant David T. Lancaster, of Dallas, Texas (deceased) and Mrs. David T. Lancaster.
10. Defendant Paul Chitwood, of Dallas, Texas

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CITATION OF THE OPINION BELOW

Miller and Loveless v. Rains County, Texas, et al., No. 97-41220, (5th Cir. July 19, 1999)(unpublished)

BASIS OF JURISDICTION

Plaintiffs-Respondents allege violations of the United States Constitution, and sue pursuant to 42 U.S.C. §1983. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343. This is an appeal from the district court's order of October 1, 1997, in which the court denied Petitioners assertions of absolute and qualified immunity (ROA 251)[1]. Notice of appeal was timely filed on October 15, 1997 (ROA 265). The ruling of the district court is a collateral order, and is deemed a final decision. The Fifth Circuit Court of Appeals had jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

The Fifth Circuit opinion was issued on July 19, 1999. Petitioners' timely requests for rehearing were denied on November 24, 1999. Accordingly, this court has jurisdiction pursuant to 28 U.S.C. §1254.

[1] "ROA" refers to the Record on Appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Statement of Facts

In January 1989, Respondents Miller and Loveless reported that they had found Loveless'

daughter, April Tucker, severely injured in a field near their home. After meeting with Respondents, the Rains County Sheriff's Department assumed that April's injuries were caused by the family's dogs, and the initial reports generated by the Department treated this an injury to a child caused by dog bite (ROA 131-33). April Tucker was transported by helicopter to a hospital, where doctors performed emergency surgery, but she died as a result of her injuries (Id). Dr. V. V. Gonzales, a defendant in this action, performed the autopsy (Id.; ROA 141)

Contrary to the Sheriff Department's initial understanding, the autopsy indicated that the wounds were not caused by dog bite, but by child abuse (Id; 135-138). The emergency room physician also believed that the injuries were not caused by dogs (ROA 140-42). An animal behavior expert from Texas A & M was consulted, and this individual believed it was unlikely that dogs could have inflicted the wounds inflicted upon April Tucker (Id.).

Evidence began to point toward the guilt of Respondents (ROA 131-152). Respondents were the only individuals who were even near the child on the morning of her death (Id.). Investigators found a

curling iron at Respondents' residence with teeth matching numerous unique abrasions on April Tucker's body. Subsequently, investigators took possession of a knife owned by Respondents. This knife had blood under the handle, as though it had been cleaned, and the blade was consistent with the wounds that caused April Tucker's death. In addition, Respondents' stories were inconsistent with each other, and inconsistent with physical evidence. For instance, April Tucker lost approximately 5 pints of blood, yet there was very little blood where Respondents said they found the body, and very little blood on her clothes, which had, curiously, been removed in the events that led to her death (Id.).

Based on evidence gathered in the investigation into the death of April Tucker, the grand jury indicted Respondents for her murder (ROA 155, 161). After trial, jury found both Respondents guilty (ROA 157-58, 163). The convictions were upheld on appeal in the face of a challenge to the sufficiency of the evidence (ROA 144-152).

On state habeas, certain "experts" testified, based on a review of photographs, that it was their opinion that the injuries to April Tucker were consistent with an animal attack. After hearing, the trial court

entered findings of fact, and recommended reversal of the conviction, finding trial counsel ineffective for failing to pursue the dog bite defense. The Court of Criminal Appeals granted the writ and vacated Respondents' convictions on December 15, 1993 (ROA 166-168). Respondents were not retried, and this lawsuit followed.

Course of Proceedings and Disposition

Respondents brought this suit pursuant to 42 U.S.C. § 1983, complaining of a wrongful prosecution. On January 3, 1997, Petitioners Richard Wilson and Alwin Smith filed their Motions for Summary Judgment (ROA 112). Therein, Petitioner Smith, a prosecutor, asserted the defenses of absolute and qualified immunity. Petitioner Wilson, an elected County Sheriff, asserted the defense of qualified immunity. On September 19, 1997, Plaintiffs filed their Response without any supporting evidence attached or referenced (ROA 240). Subsequently, Plaintiffs filed affidavits with the clerk, but gave no indication that they were summary judgment evidence. Upon learning that Plaintiff had submitted untimely affidavits, Petitioners filed a Motion to Strike and evidentiary objections to the

affidavits (ROA 257). Subsequently, the District Court entered an order on the motion to strike and objections. In the order (included in the Appendix to this Petition), the district court ruled that the affidavits submitted by Plaintiff were not considered and are not part of the summary judgment record.

On October 1, 1997, the district court entered an order denying the Motions for Summary Judgment filed by Alwin Smith and Richard Wilson (ROA 251) and this appeal was perfected. On July 19, 1999, a panel of the Fifth Circuit affirmed the district court's judgment. Both Defendant Frank Long and Petitioners Smith and Wilson filed requests for rehearing. All were denied.

ARGUMENT

There are special and important reasons to hear this case. Certainly, Petitioners have been wrongfully denied their immunity from suit for over three years now, and it is unfathomable that this could occur on the facts of this case. In light of the fact that the district court did not consider Plaintiffs' affidavits, there is literally no evidence in the summary judgment record to defeat Petitioners entitlement to immunity, and any factual dispute is

illusory. Even if these affidavits had been before the court, they contain only incompetent, conclusory assertions and unfounded speculation.

The plight of these public officials is a symptom of a judicial system that needs an adjustment, and only this Court can provide it. If immunity from suit is to remain vital, this Court must expressly hold that a proper qualified immunity analysis must embrace an express assessment of the competency of the evidence, particularly where specific and timely objections are made.

I. CERTIORARI SHOULD BE GRANTED TO ADDRESS FOR THE FIRST TIME AN IMPORTANT QUESTION OF CIVIL PROCEDURE: WHETHER A PROPER IMMUNITY ANALYSIS REQUIRES AN EXPRESS ASSESSMENT OF THE COMPETENCY OF SUMMARY JUDGMENT EVIDENCE OFFERED TO DEFEAT AN ASSERTION OF IMMUNITY.

A. The Cases That Serve to Protect Immunity Interests

Immunity from suit is not only a means of prevailing on the merits, but an "entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct.

2806, 2815, 86 L.Ed.2d 411 (1985). This Court's early qualified immunity decisions served to foster important immunity interests, and preserve a true immunity from suit.

As early as Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978), the Court recognized the importance of the Federal Rules of Civil Procedure in protecting qualified immunity. As stated by the Court in that case:

> Damages suits ... can be terminated on a properly supported motion for summary judgment based on the defense of immunity. In responding to such a motion, Plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that ... officials are not harassed by frivolous lawsuits.

Id. at 508, 98 S.Ct. at 2911.

Then, in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1992), the Court took another step to reinforce the effectiveness of the doctrine of qualified immunity. As stated by the Court in that case:

> Consistently with the balance at which we aimed in Butz, we conclude today that bare allegations of malice should not suffice to subject government

> officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials ... are shielded from liability ...insofar as their conduct does not violate clearly established statutory or constitutional rights...

Id. at 817—818, 102 S.Ct. at 2738. See also Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987)(requiring a fact-specific identification of the right at issue).

Theoretically, then, this Court had crafted a procedure whereby the purpose of the immunity doctrines would be served by using the objective test, and a firm application of the rules of civil procedure. These, the Court reasoned, would be sufficient to stamp out frivolous claims.

B. The Cases That Have Eroded the Protection of Immunity

In more recent cases, the Court has ruled in a manner that reduces the protection afforded by absolute and qualified immunity. In Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151 (1995), the Court held that courts of appeals lack jurisdiction under the collateral order doctrine to review the sufficiency of

the evidence to support a factual finding. This holding, while well-reasoned in terms of the specific jurisdictional issue presented, has clearly eroded the immunity doctrine by allowing errors to go uncorrected until after trial.

In Crawford-El v. Britton, 523 U.S. 574, 118 S.Ct. 1584 (1998), the Court declined an opportunity to shore up the qualified immunity defense. In that case, the Court rejected the imposition of a heightened standard of proof when the subjective intent of the defendant was an element of the constitutional claim. While acknowledging that this would assist in ruling out frivolous claims, the Court nevertheless rejected the possibility.

In reasoning that the qualified immunity doctrine and the interests it protects were in good hands without a substantive modification of the law, this Court noted the following:

> summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial. At that stage, if the defendant-official has made a properly supported motion, the plaintiff ... must identify affirmative evidence from which a jury could find

> that the plaintiff has carried his or her burden of proving the pertinent motive.

Id., 118 S.Ct. at 1597-98. The problem, as evidenced by the incredible injustice in the present case, is that the summary judgment procedure is not working because trial judges have not been required to assess the evidence in the light of day.

C. The Court of Appeals' Reluctance to Review the Competency of Evidence

After Johnson v. Jones, the courts of appeals have typically been unwilling to review the competency of the evidence offered to defeat an assertion of immunity. For instance, in Ellis v. Washington County & Johnson City, __ F3d ___, No. 1999 Fed. App. 0396P (6th Cir. November 30, 1999)(not yet published), in ruling on a summary judgment case, the Court noted that the only material factual dispute was based on inadmissible hearsay. However, feeling constrained by this court's decision in Johnson, the court dismissed the appeal for want of jurisdiction rather than assess the competency of the evidence.

In McCaslin v. Wilkins, 183 F.3d 775 (8th Cir. 1999), the Eighth Circuit held that it lacked jurisdiction in a collateral order appeal to review the claim that the Plaintiff's evidence was wholly speculative. Likewise, in Rambo v. Daley, 68 F.3d 203 (7th Cir.1995), the Seventh Circuit understood Johnson to prevent assessment of the competency of Plaintiff's evidence of significant injury. See also, Hoard v. Sizemore, __F3d__ , Nos. 97-5540/ 97-5585 (6th Cir., November 17, 1999)(not yet published); cf. Turner v. Scott, 119 F.3d 425, 430 (6th Cir. 1997)(summary judgment rulings must be based on admissible evidence.) These cases establish that immunity is being denied based on incompetent evidence under the existing procedures, and that there is no recourse prior to trial.

D. District Courts Should Be Required to Expressly Assess the Competency of Summary Judgment Evidence Offered to Defeat Immunity

The decisions in Crawford-El and Johnson v. Jones clearly have served to reduce the protection afforded by the immunity doctrines. This court must take steps to prevent errors like the one made by the

Fifth Circuit in this case, and like the ones made in other circuits as set forth in Section C, above.

Certainly it is in the best interests of the system if public officials are not wrongfully denied immunity from suit. Existing procedures allow for phantom fact issues to be identified based on incompetent, conclusory evidence. This Court has never specifically required an express evaluation of the competency of the evidence offered to defeat an assertion of immunity on summary judgment, but should do so now. Moreover, the Court should make it clear that on appellate review, an appellate court has the jurisdiction to review the district court's ruling on the evidentiary objections.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH EXISTING AUTHORITY BY DENYING A PROPERLY SUPPORTED MOTION FOR SUMMARY JUDGMENT WHERE NO COMPETENT EVIDENCE WAS OFFERED IN OPPOSITION TO IT

A. Summary Judgment Principles

In a series of well-known cases, this Court refined summary judgment procedure. E.g. Celotex v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986);

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct 2505 (1986). These cases stand for the proposition that summary judgment is required when the non-movant cannot muster sufficient competent evidence to create a material factual dispute.

The courts of appeals appear to understand summary judgment mechanics and give lip service to the principles announced by this Court. E.g. Gross v. Burggraf Construction Co., 53 F.3d 1531, 1541 (10th Cir. 1995)(hearsay testimony... is not suitable grist for the summary judgment mill.) Duffy v. Leading Edge Products, Inc., 44 F.3d 308, 312 (5th Cir.1995)(affidavit setting forth ultimate or conclusory facts insufficient to defeat motion for summary judgment); Good v. Dauphin County Social Services for Children & Youth, 891 F.2d 1087, 1096 (3rd Cir. 1989); Williamson v. U.S. Dept. of Agriculture, 815 F.2d 368, 383 (5th Cir.1987) (affidavits not made on personal knowledge are entitled to no weight).

However, in the absence of a clearly delineated, uniform and mandatory approach to reviewing the competency of evidence, these principles can become meaningless in any given case.

In the present case, Respondents' respective affidavits (which are substantially identical) failed to satisfy Rule 56, yet no court ever addressed the specific objections raised by Petitioners prior to denying Petitioners immunity from suit.

Anyone can create a mean-spirited, conclusory and self-serving affidavit. If a properly supported motion for summary judgment could be defeated by incompetent, unsupported assertions, there would be no reason to have a summary judgment procedure. The movant in a summary judgment proceeding is entitled to have the merit of the plaintiff's claims reviewed in light of only the *competent* evidence produced. This Court should correct the injustice dealt to these public officials and give guidance to the lower courts calculated to prevent such an occurrence in the future.

B. The Failure To Require Competent Evidence Has Wrongfully Deprived Petitioners Of Immunity From Suit

The primary significance of this case is not that the proper standards for reviewing summary judgment evidence were not applied in this case. Rather, this case is important because the failure of

the courts below to follow proper procedure has caused public servants to be wrongfully deprived of the immunity to which they are entitled.

As stated above, it must be remembered that immunity from suit is not only a means of prevailing on the merits, but an "entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). If Petitioners are forced to proceed to trial, the immunity will be effectively lost. Review after trial would come too late to vindicate the most important purpose of immunity. The failure to protect the immunity doctrines will ultimately distract officials from performing governmental duties, inhibit discretionary action, and deter able people from public service. Mitchell v. Forsyth, 472 U.S. at 525-27, 105 S.Ct. 2806; See Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985).

The courts of appeals have on numerous occasions stressed the need to produce competent evidence in order to overcome immunity defenses. E.g. See Richardson v. Oldham 12 F3d 1373 (5th Cir. 1994) (conclusory assertions and statements not shown to be on personal knowledge incompetent);

Peppers v. Coates, 887 F.2d 1493 (11th Cir. 1989)(must produce competent evidence to overcome immunity); Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)(speculation does not create a genuine issue of fact); Barker v. Norman, 651 F.2d 1107, 1126-27 (5th Cir. 1981)(subjective belief insufficient proof).

In Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991), the Plaintiff's summary judgment affidavit provided, in pertinent part, that the Plaintiff "did not pose a threat to Officer Anderson's life or to any of the other officers surrounding the car." The court analyzed this affidavit as follows:

> this affidavit amounts to virtually nothing....it is simply an opinion-- indeed, an opinion on the ultimate issue in this case. As such, it is a textbook example of conclusoriness. What is needed in an affidavit of this sort are facts, reasons, observations, and explanations -- in a word, evidence-- not sweeping conclusions. Instead, Reese has given us what amounts to merely a general denial. Such may suffice in the courts of Carroll's Wonderland, but our rules are more exacting.

Id. at 499. Regrettably, the Petitioners in this case now find themselves no better off than they would be in the courts of Wonderland.

The problem, for both Petitioners and the system, is that there is no uniform approach; if a federal judge does not want to assess the competency of the evidence he does not have to and the immunity is lost. This flaw in the system has resulted in a wrongful denial of immunity in this case, and allows for similar errors in the future.

In absence of any summary judgment evidence, or alternatively, if only Plaintiff's competent summary judgment evidence is considered, Defendants are entitled to judgment based on their assertions of absolute and qualified immunity. Petitioners ask the court to grant the petition and allow briefing on the merits.

III. THERE IS NO CONSTITUTIONAL TORT FOR MALICIOUS PROSECUTION AFTER ALBRIGHT V. OLIVER

In Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807 (1994), this Court ruled that there was no substantive due process right to be free of malicious prosecution. The Court observed that a fourth

amendment claim for malicious prosecution might exist, but did not address the issue.

Since Albright, most Circuits have found a viable action under the fourth amendment. Evans v. Ball, 168 F.3d 856 (5th Cir. 1999); Spurlock v. Satterfield, 167 F.3d 995 (6th Cir. 1999); Gallo v. City of Philadelphia, 161 F.3d 217 (3rd Cir. 1998); Uboh v. Reno, 141 F.3d 100 (11th Cir. 1998); Brooks v. City of Winston-Salem, 85 F.3d 178 (4th Cir. 1996); Taylor v. Meacham, 82 F.3d 1556 (10th Cir. 1996); Singer v. Fulton County Sheriff, 63 F.3d 110 (2nd Cir. 1995); Smart v. Board of Trustees, 34 F.3d 432 (7th Cir. 1994); but see Kerr v. Lyford 171 F.3d 330, 342 (5th Cir. 1999) (Judge Jones specially concurring to note that the Albright plurality did not endorse a Fourth Amendment tort of malicious prosecution).

On the other hand, prior to Albright, some courts had already held that the tort of malicious prosecution alone does not implicate constitutionally protected rights, and therefore is not actionable under § 1983. See, e.g., Smith v. Mass. Dept. of Corrections, 936 F.2d 1390, 1402 (1st Cir.1991) (claim of malicious prosecution alone not actionable

under § 1983); Gunderson v. Schlueter, 904 F.2d 407, 409 (8th Cir.1990) (malicious prosecution can form the basis for a section 1983 action only if the defendants' conduct infringes some provision of the Constitution or federal law.); Coogan v. City of Wixom, 820 F.2d 170, 175 (6th Cir.1987) (stating that only when malicious prosecution is so egregious as to constitute a deprivation of constitutional dimension does § 1983 provide a remedy).

In light of the above, the Court should address whether there is a constitutional tort in the nature of a malicious prosecution based on the fourth amendment. If so, the court should clearly define the contours of the claim and its elements. The court should also address what damages can be recovered given that the fourth amendment by its terms prohibits only unreasonable seizures, not prosecutions.

CONCLUSION

This Court should grant the petition for writ of certiorari, allow briefing and argument on the merits and reverse the judgment of the court below.

Respectfully submitted,
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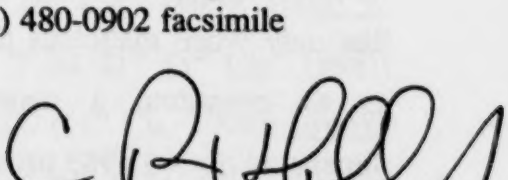
By: 

C. Rex Hall, Jr.
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APPENDIX

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-41220
Summary Calendar

JOHN HARVEY MILLER; DEBBIE TUCKER LOVELESS,
Plaintiffs-Appellees,

VERSUS

RAINS COUNTY, TEXAS; ET AL,

Defendants,

ALWIN S. SMITH; RICHARD WILSON; FRANK LONG,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(6:95-CV-982)

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:

I. Factual and Procedural Background

This case involves an alleged malicious prosecution in violation of the United States

Constitution, brought pursuant to 42 U.S.C. § 1983. The defendants-appellants, Alwin S. Smith ("Smith"), Frank Long ("Long") and Richard Wilson ("Wilson") (collectively "appellants"), appeal the district court's denial of their summary judgment motions.

A jury convicted John Harvey Miller ("Miller") and Debbie Tucker Loveless ("Loveless") (collectively "appellees") for the murder of Loveless' daughter, April Tucker ("April"). On state habeas, the Court of Criminal Appeals vacated Miller's and Loveless' conviction on the grounds of ineffective assistance of counsel. Miller and Loveless then brought a section 1983 action against Smith and Long, the prosecuting attorneys, and Wilson, the sheriff, involved in their murder convictions. Smith, Long and Wilson asserted that they were entitled to absolute and/or qualified immunity and filed motions for summary judgment. The district court denied their motions for summary judgment after finding that genuine issues of material fact existed in regard to their immunity claims. The district court, however, failed to specifically mention in its order what material facts were in dispute. Following an interlocutory appeal, this Court remanded the case to

the district court and ordered that it clarify what factual disputes existed regarding the denial of appellants' motions for summary judgment. Subsequently, the district court issued its order setting forth the following as genuine issues of material fact regarding the issues of absolute and qualified immunity:

(1) whether Smith and Long actively participated in a search of the appellees' property and residence for "evidence" on January 5, 1989;

(2) whether Smith and Long actively participated in a search of the appellees' property and residence for evidence on January 7, 1989;

(3) whether, prior to and during the criminal trial of the appellees, the appellants deliberately concealed exculpatory evidence that conclusively established that April had been attacked and killed by a family dog;

(4) whether prior to and during the criminal trial of the appellees, the appellants deliberately concealed exculpatory evidence that the family dogs had viciously attacked a social worker on several occasions; and

(5) whether prior to indictment and trial, the appellants fabricated or manufactured evidence to present to a grand jury when previous searches failed to reveal any evidence of the appellees' involvement in April's death.

Now, with the district court's order specifying the genuine issues of material fact that were utilized in denying the appellants' motions for summary judgment, this Court renders its decision.

II. Standard of Review

This Circuit reviews a district court's grant of summary judgment de novo, applying the same standard of review as would the district court. Wee Shanks v. Allied Signal, Inc., 169 F.3d 988, 992 (5th Cir. 1999). Summary judgment evidence is viewed in the light most favorable to the party opposing the motion. Eastman Kodak v. Image Technical Services, 504 U.S. 451, 456-58 (1992). Summary judgment is proper only when it appears that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Disputes concerning material facts are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Douglas v. United Auto.

Assn, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). An issue is material if it involves a fact that might affect the outcome of the suit under the governing law. Id. at 248; Thomas v. LTV Corp., 39 F.3d 611, 616 (5th Cir. 1994).

III. Discussion

The appellants assert that the factual disputes found by the district court regarding absolute and qualified immunity are not material. In addition, they argue that there is no competent summary judgment evidence in the record to support the genuine issues of fact found by the district court. We find that the appellants' arguments are not valid. After reviewing the record, we conclude that it sufficiently supports the genuine issues of fact found by the district court. Furthermore, we find that the district court was correct in determining that there are material factual disputes that prevent the appellants from being awarded summary judgment based upon their absolute and qualified immunity defenses.

Normally, a criminal prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate. Kalina v.

Fletcher, 118 S.Ct. 502, 504(1997)(citing Imbler v. Pachtman, 424 U.S. 409, 410 (1976)). However, a prosecutor who engages in investigatory functions normally conducted by the police cannot claim absolute immunity but instead may only rely upon qualified immunity. Buckley v. Fitzsimrnons, 509 U.S. 259, 275 (1993). accordingly, we hold that the district court was correct in finding that the factual disputes of whether Smith and Long actively participated in a search of the appellees' property and residence for evidence, are material to the defense of absolute. The appellants also contend that the district court improperly denied their motions for summary judgment in regard to their defense of qualified immunity. Section 1983 provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights. 42 U.S.C. § 1983. In order to determine if the appellees have a valid section 1983 claim and whether the defense of qualified immunity can be utilized, the court must determine whether the appellants' "'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."' Buckley, 509 U.S. at

268 (1993)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Thus, the appellants will be entitled to qualified immunity for their actions only if they "acted in an objectively reasonable manner in view of the existing law an the facts available to (them]." Lampkin v. City of Nacogdoches, 7 F.3d 430, 434-35 (5th Cir. 1993). Normally, the question of qualified immunity should be decided by the court without the assistance of the jury; however, where the underlying facts essential in the determination of the immunity issue are controverted, a determination by the trier of fact is necessary. Id. at 435.

It is evident that there are material facts in dispute regarding whether the appellants' conduct violated the constitutional rights of the appellees. Specifically the facts in dispute are: (a) whether prior to and during the criminal trial of the appellees, the appellants deliberately concealed exculpatory evidence that conclusively established that April had been attacked and killed by a family dog; (b) whether prior to and during the criminal trial of the appellees, the appellants deliberately concealed exculpatory evidence that the family dogs had viciously attacked a social worker on several occasions; and (c) whether

prior to indictment and trial, the appellants fabricated or manufactured evidence to present to a grand jury when previous searches failed to reveal any evidence of the appellees' involvement in April's death. Furthermore, because the facts essential in the determination of the immunity issue are controverted, the district court properly denied the appellants' motions for summary judgment so that the jury could make the essential factual findings.

Accordingly, we hold that the district court was correct in denying of the appellants' motions for summary judgment based upon the defense of qualified immunity.

IV. Conclusion

For the aforementioned reasons, we AFFIRM the district court's denial of the appellants' motions for summary judgment and REMAND for trial on the merits.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN HARVEY MILLER; DEBBIE TUCKER LOVELESS

Plaintiffs Appellees

V.

RAINS COUNTY; ET AL

Defendants

ALWIN S SMITH; RICHARD WILSON; FRANK LONG

Defendants - Appellants

Appeals from the United States District Court for the Eastern District of Texas, Tyler

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ON PETITIONS FOR REHEARING AND REHEARING EN BANC

(Opinion 07/19/99)

Before REYNALDO G GARZA, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be

polled on Rehearing En Banc, (FED.R.App.P and 5THCIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. App. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

No. 6:95cv982

JOHN HARVEY MILLER and
DEBBIE TUCKER LOVELESS

Plaintiffs,

v.

RAINS COUNTY, TEXAS, ET AL.

Defendants.

ORDER

On this day came on to be considered Defendants' Motion to Strike Affidavits and Objections to plaintiffs' Summary Judgment Evidence with Brief in Support (Docket No. 57) and Defendant Frank Long's Motion to Strike Affidavits and Objections to Affidavits of plaintiffs Miller and Loveless (Docket No. 60). After careful consideration, the Court is of the opinion that the following Order should issue.

On January 5, 1998, the Court entered an Order staying the above-entitled and numbered cause

in its entirety at the request of all the parties pending resolution of the defendants' appeal of the denial of summary judgment on qualified immunity. Further, the Court's Order denying summary judgment in the above-entitled and numbered cause does not rely on these affidavits in denying summary judgment on qualified immunity grounds and does not even acknowledge their filing. Therefore, the instant motion seeks relief which this Court feels is unnecessary to the resolution of this case on appeal. The affidavits are merely filed of record but not part of the summary judgment evidence in this case.

It is therefore ORDERED that Defendants' Motion to Strike Affidavits and Objections to Plaintiffs' Summary Judgment Evidence with Brief in Support (Docket No. 57) is hereby DENIED. It is further ORDERED that Defendant Frank Long's Motion to Strike Affidavits and Objections to Affidavits of plaintiffs Miller and Loveless (Docket No. 60) is hereby DENIED.

SIGNED this _____ day of September, 1998.

_____
UNITED STATES DISTRICT JUDGE